IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.608 OF 2002

IN

NOTICE OF MOTION NO.1644 OF 2001

IN

S.C.SUIT NO.2307 OF 1986

Smt.Lilla M.Kamlani ...Appellant

Versus

Anjali d/o.Arjun N.Mirchandani & Ors...Respondents

.....

Mr.P.S.Dani for Appellant.

Mr.Vipul Shukla for Respondents 1 & 2.

None for Respondent No.3.

.....

CORAM: A.M.KHANWILKAR, J.

APRIL 17, 2006.

P.C.

1. Heard Counsel for the parties. Admit.

Mr.Shukla waives notice for Respondents 1 and 2. Respondent No.3 is served, but none appears for the said Respondent.

2. As short question is involved, Appeal is heard forthwith by consent.

3. This Appeal from Order takes exception to the order passed by the Bombay City Civil Court Bombay dated 8th January 2002 in S.C.Suit No.2307 of 1986. By this order, the Notice of Motion taken out by the Appellant under Order IX Rule 13 of the Code of Civil Procedure came to be dismissed. On going through the impugned Judgment, there is no finding recorded by the Trial Court that the said Application under Order IX Rule 13 of the Code is not maintainable as such. The Court below, however, in Para 3 of the impugned Judgment has proceeded on the assumption that the Application is maintainable and held that even if the Notice of Motion was to be allowed, it will serve no purpose and the Appellant/Defendant will not be affected in any manner, as the decree merely restrains the Appellant/Defendant from parting with suit possession of the property in view of the agreement between the parties. Whether the decree as is passed was just and proper in the fact situation of the present case, would be matter on merits. The Trial Court while considering the Notice of Motion

under Order IX Rule 13 ought to have confined to the issue as to whether the ex-parte decree passed on 27th April 2000 deserves to be set-aside for sufficient cause made out by the Defendant/Appellant herein for his non-appearance on that behalf. No such adjudication has been done by the Trial Court.

4. In the circumstances, the impugned order is set-aside and instead, the Notice of Motion is restored to the file of the Trial Court to its original number to be decided on its own merits in accordance with law afresh. It is made clear that the issue as to whether the said Notice of Motion is maintainable under Order IX Rule 13 may also be considered by the Trial Court in view of the remand order passed by this Court. All questions are left open.

5. Appeal disposed of on the above terms.

A.M.KHANWILKAR, J.